No. 83-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

The People of the State of California,

Petitioner,

v.

Albert Walter Trombetta, *et al.*,

Respondents.

BRIEF OF THE STATE OF NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF THE BRIEF OF PETITIONER

RUFUS L. EDMISTEN
Attorney General of
North Carolina

ISAAC T. AVERY, III
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-7952

OF COUNSEL:

L. Poindexter Watts
Professor of Public Law and Government
Institute of Government
The University of North Carolina
at Chapel Hill
Chapel Hill, North Carolina 27514
(919) 966-4377

ATTORNEYS FOR THE STATE OF NORTH CAROLINA

DiCesare and Associates Printing • Washington, D.C. • (202) 331-0101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes:

Miscellaneous

NO. 83-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

The People of the State of California,
Petitioner,

v.

Albert Walter Trombetta, *et al.*,
Respondents.

BRIEF OF THE STATE OF NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF THE BRIEF OF PETITIONER

INTEREST OF AMICUS CURIAE

The State of North Carolina supports the position of the People of the State of California in this case, but it finds that the issues posed by California, on which the writ of certiorari was granted, and the arguments in the petition for the writ, generally presuppose that *People v. Hitch*, 527 P.2d 361 (Cal. 1974), correctly applies the due process disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). The *Hitch* case required the State of California to preserve the acid-solution ampoules used when giving a chemical test of the breath to determine a driver's blood alcohol content. *Hitch* thus held that the by-products of *inculpatory* evidence must be temporarily preserved by a state, without request, to facilitate a later possible *Brady* disclosure request. The application of *Brady* to lost or destroyed evidence is a highly complex issue that the Court refused to constitutionalize on the equivocal facts in *United States v. Augenblick*, 393 U.S. 348 (1969), and nothing in any decision of this Court foreshadows or ratifies the extension of *Brady* made in *Hitch*. The State of North Carolina is concerned that the Court may accept the issues as framed by the parties, and either implicitly approve *Hitch* or fail to make it clear that the Court is refraining from giving plenary consideration to the maze of knotty issues involved in applying *Brady* to lost or destroyed evidence.

In addition to North Carolina's concern about a ruling which may place the law of discovery in criminal cases in a constitutional strait jacket, the State has a specific interest in the subject matter of the *Hitch* case. Following *Hitch*, the State of California found it expedient to get rid of almost all of its breath-testing instruments that used acid-solution

ampoules in making chemical tests rather than comply with the burdensome preservation requirements of that case. Thus, the petitioner has no particular need to attack *Hitch*. North Carolina has a chemical testing program that is conceded to be one of the better ones in the country, and it principally uses ampoule-based breath testing instruments. Law enforcement agencies throughout the State own more than 400 such instruments. Therefore, North Carolina has a strong interest in alerting the Court to the fact that perhaps the key scientific premise of *Hitch* is questionable. Most jurisdictions that have considered the ampoule-preservation issue have ruled contrary to *Hitch*.

SUMMARY OF ARGUMENT

Brady v. Maryland applies only to evidence still in existence and which is favorable to the defendant. This interpretation of due process should not be extended to all missing or destroyed evidence absent a showing that the evidence was favorable or that the prosecution was acting in bad faith. The suppression of competent, legally obtained evidence of the prosecution merely for the failure to preserve that evidence or corroborative by-products for defense retesting, which evidence may or may not have been requested and which may or may not be favorable, is not required as a matter of due process of law.

Even if due process were to require the preservation of potentially favorable evidence material to the case, there is no present basis for requiring a state to preserve the ampoules used in breath-testing instruments. The scientific basis upon which *Hitch* was decided is suspect at best. Scientific analysis of the test ampoule cannot, under available technology, yield credible evidence to corroborate

the original test results. Any other benefits to the defendant are trivial and not constitutionally material.

State legislatures and courts have generally imposed strict procedural requirements upon chemical testing programs designed to insure the integrity of test results, and these requirements are revised from time to time in the light of experience. There is thus no need to constitutionalize a rule of discovery with respect to these tests.

ARGUMENT

I. THE *HITCH* DECISION IS AN UNWARRANTED EXTENSION OF THE *BRADY* DISCLOSURE DOCTRINE. THE DECISION COMPELS EXCLUSION OF COMPETENT EVIDENCE BECAUSE OF THE ROUTINE, NONMALICIOUS DESTRUCTION OF THE BY-PRODUCT OF THAT INCULPATORY EVIDENCE, AND REPRESENTS AN IMPROPER CONSTITUTIONALIZATION OF THE RULES OF DISCOVERY.

Until now, cases before the Court applying *Brady v. Maryland*, 373 U.S. 83 (1963), have involved evidence still in existence and as to which there was no doubt but that it was favorable to the defendant.[1] In this context, the motive of the police or prosecution in suppressing the evidence has

---

[1]See State v. Nerison, 625 P.2d 735, 739 n.3 (Wash. App. 1981) (nonpreservation of filament of tail light in case involving automobile accident). This opinion suggests a different resolution of the policy issues than advocated in this brief, but poses the policy choices with more clarity than most.

been unimportant.[2] The courts are faced with a difficult policy choice, however, when evidence has been lost or destroyed, and it is impossible later to determine whether the evidence would have been favorable. If one can avoid *Brady's* due process disclosure requirement simply by destroying favorable evidence, a defendant's constitutional entitlement may be rendered nugatory.[3] On the other hand, imposing a presumption that all lost or destroyed evidence was favorable to the defendant would cause havoc within the criminal justice system, given the large caseloads and scant resources that are the rule with most prosecutors and police. It is not the purpose of this brief to suggest the exact content of a middle-ground position, but to alert the Court to the need to explore this area. The issues involve much more than just chemical tests for alcohol, and the Court should consider the impact of any constitutionally-based evidence-preservation requirement generally upon all types of criminal cases.

A middle-ground rule something like the one announced for the Jencks Act and Rule 16 violations in *United States v. Augenblick*, 393 U.S. 348 (1969), may be a reasonable compromise. The prosecution would bear the burden of showing that there was no bad faith or inexcusable negligence by the police or prosecutor responsible for the disappearance of the evidence. If there is police or prosecutorial bad faith, the likelihood that the missing evidence was favorable becomes much greater.[4]

---

[2]Brady v. Maryland, 373 U.S. at 87: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

[3]United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971).

[4]People v. Hitch, 527 P.2d 361, 370 n.7 (Cal. 1974). This situation involving evidence no longer available for evaluation is distinguishable from that discussed in United States v. Agurs, 427 U.S. 97, 110 (1976).

A question remains whether a different rule should apply if the lost or destroyed evidence bears upon the integrity of evidence that is crucial to the case—so that, *if* favorable, disclosure would be required without request under *United States v. Agurs*, 427 U.S. 97 (1976).[5] This is a sensitive issue that the Court will eventually have to resolve, but as a matter of logic the good faith or bad faith of the police and prosecution in causing the loss or destruction will still bear

---

[5]As discussed in the *Nerison* case cited in note 1 above, the definition of constitutional materiality set out in *Agurs* and the distinction between *Agurs* and *Brady* material (requiring a specific request), may not fit the case involving lost or destroyed evidence. One issue that has not been often addressed in ampoule-preservation cases has been whether it makes any difference if the conviction was obtained under an impaired driving standard as opposed to the per se standard (in which the offense consists of driving with more than a certain level of alcohol in one's blood). It is arguable that when the chemical test evidence bears upon the dispositive evidence in the case, anything that may bear upon the credibility of that evidence is more constitutionally material than when conviction may alternatively have been based upon evidence of impairment. See State v. Booth, 295 N.W.2d 194, 198 (Wis. App. 1980) ("direct evidence against the accused"). This is probably an artificial distinction, however, given the dynamics of drinking-driving trials. If there is sufficient constitutional error to require exclusion of the chemical test results, a new trial will be required in almost every case, for the verdict that a defendant was "under the influence" of alcohol or "impaired" may have been inescapably affected by the test evidence. If, at the time of retrial, the prosecutor's only option is to utilize a per se law, he would then be required to dismiss the case.

on the likelihood of the evidence's having been favorable.[6] It is a great leap beyond the decisions of this Court to create, as a matter of due process, an automatic preservation requirement in anticipation of defense discovery requests, and to impose the sanction of excluding otherwise valid evidence, without regard to motive, because of the failure to furnish evidence that *might* impeach the evidence offered by the prosecution.[7]

---

[6]A case that reached a questionable result because of the failure of the court to consider the relevancy of bad faith is State v. Boyd, 629 P.2d 930 (Wash. App. 1981) (erasure of tape recording through misunderstanding). Compare State v. Gilchrist, 590 P.2d 809 (Wash. 1979). It is noteworthy that in United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), upon which all the cases following *Hitch's* due process rule heavily rely, two out of the three judges found "at the very least a hint of bad faith in the record." 439 F.2d at 647.

[7]The dictum from United States v. Bryant widely quoted by pro-*Hitch* courts is: "What we do know is that the conversations recorded on the tape were absolutely crucial to the question of the appellants' guilt or innocence. That fact, coupled with the unavoidable possibility that the tape *might* have been significantly 'favorable' to the accused, is enough to bring these cases within the constitutional concern. If the due process requirement is directed to evidence whose non-disclosure '*might*' have harmed the accused, its purpose clearly reaches the type of missing evidence at issue here. Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal." United States v. Bryant, 439 F.2d at 648 (emphasis added).

Proponents of the *Hitch* ruling will maintain that a prophylactic rule is essential in drunk driving cases because they are so numerous and because the routine, nonmalicious destruction of ampoules was a standarized part of the testing procedure.[8] This argument totally misses the mark. The large number of cases involved and the standardized practices that cause the ampoules to be disposed of are precisely matters to be addressed by discovery statutes and rules of court.[9] The courts should not expand due process concepts beyond the traditional case-by-case analysis to constitutionalize discovery procedures. The Court said in *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977):

> There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . . " *Wardus v. Oregon*, 412 U.S. 470, 474 (1973).

Although some courts have accepted as an appropriate

---

[8]See People v. Hitch, 527 P.2d at 369 ("prosecution . . . [must] show that the governmental agencies . . . adhere[d] to rigorous and systematic procedures designed to preserve . . .").

[9]Note that Lauderdale v. State, 548 P.2d 376 (Alaska 1976) is based, in part, on a discovery statute rather than the *Bryant-Hitch* due process analysis. Compare State v. Humphrey, 318 N.W.2d 386 (Wis. 1982), in which the lower court ruling of *State v. Booth* is apparently allowed to stand primarily because of the adoption of an ampoule-preservation statute by the legislature. It may be further noted that the parties in the case before the Court are arguing the impact upon its breath-preservation issues the adoption of emergency legislation in California of a statute mandating state assistance to a defendant in a drinking-driving prosecution in obtaining a back-up blood or urine sample when a breath test is taken and no breath sample is retained. Cal. Veh Code § 13353.5. Note also the Vermont statute cited in State v. Fournier, 340 A.2d 71 (Vt. 1975).

gloss on *Brady* both Judge Skelly Wright's dictum in *United States v. Bryant*[10] and the *Hitch* extension of it to routine, nonmalicious instances of destruction,[11] others have questioned whether due process extends so far. See, for example, *Edwards v. Oklahoma*, 429 F. Supp. 668 (W.D. Okla. 1976), reversed apparently on other grounds, 557 F.2d 1119 (10th Cir. 1978);[12] *State v. Newton*, 262 S.E. 2d 906 (S.C. 1980); *State v. Helmer*, 278 N.W.2d 808 (S.D. 1979); *State v. Canaday*, 585 P.2d 1185 (Wash. 1978). See also *State v. Young*, 614 P.2d 441 (Kan. 1980) (involved breath sample request); *State v. Turpin*, 606 S.W.2d 907

---

[10]See quoted material in note 7, *supra*. This statement is a dictum because the court remanded for a further factual hearing and for the application of the *Augenblick* standard. The court indicated, though, the stringent constitutional gloss it announced in dictum would afterwards prevail: "in the future decision on the question of sanctions in cases such as these will be guided by the preservation requirement announced above, and negligence will be no excuse." 439 F.2d at 653.

[11]Cases accepting the *Bryant-Hitch* gloss on *Brady's* due process rule include Scales v. City of Mesa, 594 P.2d 97 (Ariz. 1979); Garcia v. District Court, 589 P.2d 924 (Colo. 1979); People v. Santiago, 455 N.Y.S.2d 511 (Supp. Ct., Trial Term, N.Y. County 1982) (but rejected ampoule-preservation requirement on scientific grounds); State v. Larson, 313 N.W.2d 750 (N.D. 1981) (but rejected ampoule-preservation requirement on scientific grounds); State v. Michener, 550 P.2d 449 (Or. App. 1976); State v. Amundson, 230 N.W.2d 775 (Wis. 1975).

[12]The Court of Appeals remanded for an evidentiary hearing because it was suspicious as to why the Breathalyzer operators destroyed the ampoules when the applicable regulations simply called for disposing of them. The court apparently did not grasp that the destruction was through dropping the opened ampoules in a large vat of water—to dilute the strong sulfuric acid solution in the ampoules.

(Tex. Crim. 1980) (involved inability of defendant to obtain statutorily authorized corroborative blood test).[13] Several of these cases were based, in part, on the fact that the defendant may argue to the jury concerning the defense inability to corroborate the key chemical test evidence against him. Thus, when the ampoule is not preserved, the issue is one of weight to be given the chemical test evidence rather than admissibility.

Finally, it must be stressed that constitutionalizing discovery in the ampoule-retention situation imposes the drastic sanction of excluding the evidence of the chemical test unless a burdensome procedure of retention is instituted. This sanction does not comport with real-world probabilities with respect to the likelihood of significant error in the administration of chemical testing. As noted in *People v. Santiago*, 455 N.Y.S.2d 511, 516 (Sup. Ct., Trial Term, N.Y. County 1982): "As a general rule, any slight error in the operation of the breathalyzer, due to operator fault or mechanical defect will generate lower, rather than higher reading of blood alcohol percentage." The defendant's own expert in *People v. Stark*, 251 N.W.2d 574 (Mich. App. 1977), who had had extensive experience with chemical testing programs, found that there was error in only two percent of the cases involving verification of

---

[13]It should be noted that most state chemical test statutes give the defendant the right to arrange for his independent back-up test, but only a few mandate that the state assist the defendant in any significant way in obtaining the specimen for back-up testing. Some courts have held that this right to an independent test is an illusory one, as most defendants are unable to arrange for it. Other courts have used the right to obtain an independent test as a basis for rejecting any ampoule-preservation requirement. For a breath sample case turning in part on the right to an independent test, see State v. Cornelius, 452 A.2d 464 (N.H. 1982).

chemical test ampoules. The potential benefit to the defendant, if any, cannot possibly justify such a drastic sanction as exclusion of competent chemical test evidence.

II. THE *HITCH* RULE OF AMPOULE PRESERVATION IS NOT BASED UPON ACCEPTED SCIENTIFIC TECHNOLOGY, AND OTHER PROTECTIONS GUARANTEED BY STATE CHEMICAL TEST STATUTES AND DECISIONS ASSURE THE DEFENDANT OF DUE PROCESS.

The cases on ampoule preservation are a confusing welter. Perhaps the most important factor distinguishing them is not the quality of counsel or of the courts deciding them, but the quality of the scientific testimony, if any, presented in the case record. There are indeed chemists who specialize in appearing for the defense in chemical test cases to testify that it is feasible to preserve ampoules. In most instances this testimony is based more on theory than on practical field experience with testing instruments. On the other hand, among those forensic experts connected with state testing programs, some are obviously more scrupulously careful in their scientific testimony than others. In general, though, the state experts have more opportunity for field experience and are thus more reliable.[14]

In discussing ampoule-preservation issues, it is useful to note that almost all cases have involved either the Breathalyzer Model 900 or Model 900A. The two

---

[14]Perhaps the most dramatic illustration of the difference the expert makes is in the opinion in People v. Santiago, *supra*. This opinion is must reading for anyone attempting to understand the ampoule-preservation cases spawned by *Hitch*.

instruments look almost identical, and the minor differences between the models are irrelevant to the issues involved in ampoule preservation. Therefore, in the following discussion the term "Breathalyzer" will be used without designating whether the instrument is Model 900 or 900A.[15]

The instrument under discussion in *People v. Hitch* was a Breathalyzer. The Supreme Court of California set out in a footnote[16] a summary of the scientific findings made in the case. The court premised the decision on its being scientifically possible to retest the ampoule and its contents to determine four principal things:

1. Whether there was at least three milliliters of acid reagent solution in the ampoule.
2. Whether the solution contained the correct amount of the key ingredient—0.025 percent of potassium dichromate.
3. Whether there were any optical defects in the glass of the test ampoule or the comparison ampoule that may have affected test accuracy.
4. Upon a retest of the test ampoule, whether approximately the same test results were reached.

At the time *Hitch* was decided, the major controversy in the scientific community concerned the fourth finding. It is obvious the California court believed that a retest would

---

[15]The Breathalyzer Models 1000 at 1100 were automated instruments also using ampoules containing a chemical reagent. Maintenance was difficult with these models, however, and are not now widely used. The current Model 2000 Breathalyzer is based upon infra-red analysis of alcohol in the breath, and has no ampoules.

[16]People v. Hitch, 527 P.2d at 364, n. 1.

give a result similar to the original test result most of the time and thus provide a generally reliable "ballpark" check upon the accuracy of the test.[17] Time, however, has proved this assumption wrong. As noted by the expert who proved reliable in *People v. Santiago, supra,* later retest results may unpredictably prove to be higher than, lower than, or about the same as the original result.[18] Compare the benefits to the defendant from ampoule preservation listed by the court in the fairly recent case of *State v. Booth,* 295 N.W.2d 194 (Wis. App. 1980). The Wisconsin court lists the first three matters, omits the fourth, and adds a new one: if alcohol was in fact introduced into the test ampoule, the process of analysis will leave acetic acid as a by-product. Absence of acetic acid would prove that there was no alcohol in the defendant's breath.

The Committee on Alcohol and Other Drugs of the National Safety Council counts among its members almost all of the truly distinguished forensic experts in the United States and Canada who have practical field experience with chemical tests for alcohol. Shortly after the *Hitch* decision, the Committee issued a pronouncement that, using currently available technology, there was no feasible way known to preserve a Breathalyzer ampoule for later retesting and have any guarantee of accuracy. The Committee has at least twice reassessed the ampoule-

---

[17] *Ibid.* The court's finding was that passage of time and method of storage may affect the results and "that upon a retest the original test cannot be duplicated with 100 percent accuracy."

[18] People v. Santiago, 455 N.Y.S.2d at 517, n. 2.

preservation technology, and reaffirmed its pronouncement.[19] The current situation on ampoule preservation now seems clear: the major benefit to the defendant assumed by the *Hitch* court to flow from its ruling is still not technically capable of being conferred. Given the trivial benefits to defendants embodied in the other corroborative checks enumerated by *Hitch* as amended by *Booth*, there is no compelling basis for constitutionalizing an ampoule-preservation requirement—even if one accepted the *Bryant-Hitch* gloss on *Brady* as correct. This position is reflected in the following relatively recent ampoule-preservation decisions: *People v. Santiago, supra; State v. Larson*, 313 N.W.2d 750 (N.D. 1981); *State v. Helmer*, 278 N.W.2d 808 (S.D. 1979); *State v. Canaday*, 585 P.2d 1185 (Wash. 1978).

---

[19]The original pronouncement of October 1975 was published in 23 J. Forensic Sci. 432 (July 1978). A reaffirmance made on October 21, 1981, was published in 3 Am. J. Forensic Med. & Pathology 273 (Sep. 1982). The subsequent reaffirmance of October 17, 1982, has not yet been published in the scientific literature. The 1975 statement read as follows:

> Some issues have been raised in the California Supreme Court's decision in *People v. Hitch* and allied cases in which the court held that chemicals and ampoules used in breath test cases must be preserved for possible pre-trial examination and analysis by defendants should they so demand it. A review of the scientific merits of this position has been made. It is concluded that at the present time, a scientifically valid procedure is not known to be available for the reexamination of a Breathalyzer ampoule that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis.

In the two journal articles cited above, the committee's name is given as the "Committee on Alcohol and Drugs"; this is because the committee has only recently changed its name to "Committee on Alcohol and Other Drugs."

An analysis of the purported benefits to the defendant of ampoule preservation currently being cited by pro-*Hitch* courts will make clear why they can be characterized as trivial. To take them in order:

1. **Amount of Reagent:** This benefit is the most substantial one. If there is less than three milliliters of the reagent in the ampoule, the Breathalyzer will give a falsely high reading. It is possible that an ampoule could be underfilled in the manufacturing process, and there must be a check to make sure that sufficient reagent is in a test ampoule. In the real world, however, the possibility that a defendant would be tested with an underfilled ampoule is extraordinarily small. First, the manufacturing process does not usually result in underfilling only certain ampoules out of a batch, and if all or a large number of the ampoules in a batch were underfilled the problem would be caught by the random testing of ampoules from each new batch that is customary in almost all jurisdictions. Second, the operational checklist that is universally used by Breathalyzer operators requires the operator as a preparatory step to gauge the ampoule to make sure the correct amount of reagent is present; and when this gauging of the ampoule is completed, the operator must check the appropriate block on the checklist. These checklists are available in court for verification that the operator followed the prescribed procedure in administering the test. These steps should so minimize the chance of underfilled ampoules in actual tests that a defendant's benefit from double-checking the volume of reagent would indeed be trivial.[20]

---

[20]State v. Helmer, *supra*, found volume checking to be the only benefit to the defendant, based upon the scientific evidence in its record, and further found the benefit not sufficiently material to require preservation.

2. **Amount of Potassium Dichromate:** It is difficult to conceive of a situation in which a particular ampoule out of a batch would have an incorrect percentage of potassium dichromate in the reagent, as the reagent solution is mixed in a large quantity with extreme care and with manufacturer's checks before batches of ampoules are filled. If all ampoules in a batch had an incorrect percentage of potassium dichromate, this error would be immediately caught by the routine system checks that almost all jurisdictions require in approved breath-testing procedures. The chance of this error in an individual ampoule is much smaller that the chance that an ampoule would be underfilled. This supposed benefit to the defendant is thus also trivial.

3. **Optical Defects:** In addition to checking for optical defects in the glass of the ampoules mentioned in *Hitch*, some courts have added a check for dirt or other contaminants on the exterior of either the test or comparison ampoule among the supposed benefits to defendants of preserving ampoules. As a practical matter, though, these benefits are most trival. Optical defects would give incorrect results in a Breathalyzer test only in two situations. First, if the optical defect was so severe that insufficient light were to pass through the ampoule to allow completion of a test, there could be no valid test reading produced. When the test ampoule is compared to a standard ampoule, the instrument is balanced based upon this comparison—and such a defect would be apparent. The other possibility in which optical defects may distort test readings would occur when either the test

ampoule or comparison ampoule had a defect that affected the passage of light and the optical defect *moved* within the ampoule well. If the ampoule does not move—so that the light passage through an optical defect remains constant—the defect is immaterial, since the instrument has been balanced against another ampoule. All properly trained and licensed operators of Breathalyzers are instructed to guard against any vibrations of the instrument that may cause ampoules to rotate within the ampoule wells. In addition, Breathalyzers are designed so that ampoules fit quite snugly within their wells—to prevent the possibility of any distorting movement. Thus, the realistic possibility of error caused by optical defects is also most trivial.

4. **Presence of Acetic Acid:** As indicated, the absence of acetic acid would prove that there was no alcohol whatever in a defendant's breath sample. The likelihood, though, that a properly conducted Breathalyzer test would be subject to contamination that would give an apparent test reading of significance when the defendant had no alcohol in his breath is most rare. This fact can also be established by extrinsic evidence, *e.g.*, lack of impairment or no odor of an alcoholic beverage on a defendant's breath. In the real world, this supposed benefit to the defendant is also trivial.

In the case of readings that are close to a critical per se or presumptive level under a jurisdiction's statute, there would be a real benefit to defendants if there could be an effective retest of the ampoule as a guard against operator error. But, as has been shown, such a retest is not possible under

present ampoule preservation technology. Ironically, the technology for preserving breath samples, or the alcohol in them, though disputed also, is undoubtedly more nearly capable of providing a reliable double-check.[21]

It should be stressed, however, that the double-check to be provided by either preservation of ampoule or of breath samples would be most useful against inadvertent operator error.[22] If an operator set out deliberately to manipulate the results, he would be able — unless extremely naive — to palm off ampoules or breath samples to match his false reading. Preservation would be of no utility.

The Breathalyzer Models 900 and 900A require more operator involvement in producing the results than do later automated instruments, and this has been a source of attack on them. A legislative committee in North Carolina investigated the possibility of shifting to other instruments that were completely automatic in operation—making operator manipulation or inadvertent error far more difficult. The findings were that these more complex automated instruments were more expensive to buy, quite a bit more difficult to maintain, and were not more accurate than the Breathalyzers now in use. In addition, a shift would cost several million dollars in instrument costs, without regard to the cost of retraining all operators.

---

[21]The irony lies in the fact that a breath-preservation requirement requires the state to *create* evidence for the defendant, and goes even further than *Hitch* beyond the boundaries of due process previously defined by the Court.

[22]Inadvertent operator error is guarded against by the general fail-safe design of the Breathalyzer. The effect of most errors will be to give falsely low readings. See People v. Santiago, 455 N.Y.S.2d at 516.

The legislative method for reducing operator or instrumental error therfore was to amend the chemical test statutes to require two tests of a defendant's breath after January 1, 1985.[23] The results will not be admissible unless there is a close correlation of the two tests results, and the lower of the two readings will be used by the court. A concurrent amendment was adopted to make it somewhat easier for a defendant to secure his independent back-up test.[24] These changes in addition to previously-granted rights to consult counsel and have a witness review the testing procedure[25] show that the North Carolina General Assembly is responsive to the need to provide in a common-sense way for assuring the integrity of chemical test results.

A reading of the cases from other states cited in this brief makes it plain that the other states also have a substantial interest in requiring—by statute, agency regulation, court rule, and case law—procedures that will assure the integrity of chemical test results. Those states also change their procedural requirements over time in the light of experience. The requirements differ from state to state, but the pattern of the minimum procedures required in any state is sufficient to generate confidence. There is no question that the individual state discovery procedures applicable to chemical testing are usually not so rigid as those that *Hitch* would impose, but the State of North Carolina contends that adoption of those procedures is properly a matter to be left to the states. They have

---

[23]N.C Gen. Stat. § 20-139.1(b2) (1983).

[24]See N.C. Gen. Stat. § 20-139. 1(d) (1983): ". . . .Any law enforcement officer having in his charge any person who has submitted to a chemical analysis must assist the person in contracting someone to administer the additional testing *or to withdraw blood, and must allow access to the person for that purpose.* . . ." (Emphasized language added.)

[25]N.C. Gen. Stat. § 20-16.2(a) (1983).

demonstrated that they can be trusted in this area, and there is no compelling policy reason or precedent in this Court for imposing an expansive, rigid rule of due process as is embodied in *Hitch*.

CONCLUSION

The State of North Carolina urges the Court to reject the California courts' purported rule of due process, requiring the preservation of breath samples, on the fundamental ground that *Hitch* and its progeny are unwarranted extensions of *Brady*.

If the Court were to rule against a breath-preservation requirement on the narrower ground that this places an impermissible burden upon the prosecution to create evidence for the defense, North Carolina would urge the Court to guard against indicating any implicit approval of a constitutional doctrine that would require preservation of ampoules.

If the Court were to rule that due process requires an evidence-preservation doctrine in some instances, North Carolina would urge the Court to indicate that its decision in no way involves acceptance of the scientific premises of the *Hitch* decision.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Isaac T. Avery, III
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-7952

OF COUNSEL:

L. Poindexter Watts
Professor of Public Law and Government
Institute of Government
The University of North Carolina
at Chapel Hill
Chapel Hill, North Carolina 27511
(919) 966-4377

APPENDICES

APPENDIX A

CASES EXAMINED THAT REQUIRED AMPOULE PRESERVATION

Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Scales v. City of Mesa, 594 P.2d 97 (Ariz. 1979).

People v. Hitch, 527 P.2d 361 (Cal. 1974).
Note: Later cases from California applying the *Hitch* doctrine are not cited.

Garcia v. District Court, 589 P.2d 924 (Colo. 1979).

People v. Richter, 423 N.Y.S.2d 610 (Nassau County Ct. 1979).

State v. Michener, 550 P.2d 449 (Or. App. 1976).

State v. Simpson, 594 P.2d 425 (Or. App. 1979).

City of Lodi v. Hine, 318 N.W.2d 383 (Wis. 1982) (based upon statute).

State v. Booth, 295 N.W.2d 194 (Wis. App. 1980).

CASES EXAMINED THAT DID NOT REQUIRE AMPOULE PRESERVATION

State v. Superior Court, 487 P.2d 399 (Ariz. 1971) (overruled by *Scales v. City of Mesa* on above list).

State v. Cantu, 569 P.2d 298 (Ariz. App. 1977) (overruled by *Scales v. City of Mesa* on above list).

People v. Hedrick, 557 P.2d 378 (Colo. 1976) (overruled by *Garcia v. District Court* on above list).

State v. Phillipe, 402 So. 2d 33 (Fla. App. 1981).

People v. Godbout, 356 N.E.2d 865 (Ill. App. 1976).

People v. Reed, 416 N.E.2d 694 (Ill. App. 1981).

State v. Sutherburg, 402 A.2d 1294 (Me. 1979) (a non-Breathalyzer case using ampoule-based technology; challenge directed to failure to use available alternative method that would have preserved breath sample).

People v. Stark, 251 N.W.2d 574 (Mich. App. 1977).

State v. Hanson, 493 S.W.2d 8 (Mo. App. 1973) (based upon failure to lay foundation for challenge in record, despite state agency rule requiring ampoule preservation).

City of Cape Girardeau v. Geiser, 598 S.W.2d 151 (Mo. App. 1979) (rejected challenge because no objection made at trial as to failure to preserve ampoule).

State v. Bush, 595 S.W.2d 386 (Mo. App. 1980) (interpreted agency rule that requires ampoule preservation to apply only when there is an immediate request after the test; indicated doubt as to validity of result when ampoule retested).

State v. Shutt, 363 A.2d 406 (N.H. 1976).

State v. Bryan, 336 A.2d 511 (N.J. Super, Law Div. 1974).

State v. Teare, 342 A.2d 556 (N.J. Super, App. Div. 1975).

People v. Farrell, 444 N.E.2d 978 (N.Y. 1982).

People v. Amidon, 427 N.Y.S.2d 727 (Ontario County Ct. 1980).

People v. LePree, 430 N.Y.S.2d 778 (Rochester City Ct. 1980).

People v. Santiago, 455 N.Y.S.2d 511 (Sup. Ct., Trial Term, N.Y. County 1982).

State v. Larson, 313 N.W.2d 750 (N.D. 1981).

State v. Grose, 340 N.E.2d 441 (Ohio Mun. Ct. 1975).

State v. Watson, 355 N.E.2d 883 (Ohio App. 1975).

Edwards v. State, 544 P.2d 60 (Okla. Cr. 1975).

Edwards v. Oklahoma, 429 F. Supp. 668 (W.D. Okla. 1976), reversed apparently on other grounds, 577 F.2d 1119 (10th Cir. 1978).

State v. Newton, 262 S.E.2d 906 (S.C. 1980).

State v. Helmer, 278 N.W.2d 808 (S.D. 1979).

State v. Turpin, 606 S.W.2d 907 (Tex. Cr. 1980).

State v. Canaday, 585 P.2d 1185 (Wash. 1978).

State v. Humphrey, 318 N.W.2d 386 (Wis. 1982) (based upon lack of specific request; compare *City of Lodi v. Hine* in above list).

APPENDIX B

STATES CURRENTLY USING SIGNIFICANT NUMBERS OF THE BREATHALYZER MODELS 900 AND 900A IN ENFORCEMENT PROGRAMS*

Florida

Indiana

Massachusetts

Michigan

Minnesota

New Jersey

North Carolina

Ohio

Oklahoma

Pennsylvania

Rhode Island

South Carolina

Virginia

Washington

Wisconsin

*Information furnished by the current manufacturer of models of the Breathalyzer, the Smith & Wesson Electronics Company, Springfield, Massachusetts.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief of Amicus Curiae to the Supreme Court of the United States upon the persons indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed to the following:

John F. De Meo
1022 Mendocino Avenue
Santa Rosa, California 95401

Frederick J. Haley
1 Kaiser Plaza
Oakland, California 94612

Thomas R. Kenney
200 E. Street
P.O. Box 1896
Santa Rosa, California 95402

John A. Pettis
1034 Court Street
Martinez, California 94553

John K Van De Kamp,
Attorney General

William D. Stein,
Chief Assistant Attorney General
Gloria F. De Hart,
Deputy Attorney General
Charles R. B. Kirk,
Deputy Attorney General
6000 State Building
San Francisco, California 94102

This the 23rd day of February, 1984.

RUFUS L. EDMISTEN
Attorney General

Isaac T. Avery, III
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-7952